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No. 91-1024

In the Supreme Court of the United States

OCTOBER TERM, 1991

VIRGILIO G. GUERRERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a chief petty officer with almost ten years of service in the Navy, had adequate notice that cross-dressing in public view was prejudicial to the good order and discipline of the military or was likely to bring discredit upon the armed forces, in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-8a, is reported at 33 M.J. 295. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 9a-17a, is reported at 31 M.J. 692.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1991. The petition for a writ of certiorari was timely filed on December 26, 1991 (the day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a first class petty officer who had been selected to advance to the rank of chief petty officer at the time of his offenses,[1] was tried by a special court-martial. He was convicted on two specifications of cross-dressing[2] in public view, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934.[3] He was sentenced to a bad-conduct discharge and a reduction in pay grade.[4] The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Re-

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[1] In accordance with Navy promotion regulations, petitioner had been selected for promotion to the rank of chief petty officer (E-7), but had not been formally advanced to that rank. Tr. 66. He was, however, "frocked," *i.e.*, authorized by regulation to wear the uniform and have the title of chief petty officer.

[2] Petitioner engaged in cross-dressing by wearing women's clothing.

[3] Article 134 of the UCMJ is known as the General Article. It punishes three categories of crimes—termed Clause 1, Clause 2, and Clause 3 offenses—that are not expressly defined by other, more specific provisions of the Code. Clause 1 punishes "disorders and neglects to the prejudice of good order and discipline in the armed forces." Clause 2 punishes "conduct of a nature to bring discredit upon the armed forces." Clause 3 punishes crimes in violation of federal law applicable to civilians. Para. 60(c) *Manual for Courts-Martial, United States—1984* (*Manual*) IV-109 to IV-110. Paragraphs 61-113 of the *Manual* flesh out the conduct that violates Clauses 1 and 2 by defining specific offenses under Article 134.

[4] Petitioner was acquitted of one specification of soliciting a homosexual act from a fireman recruit, also in violation of Article 134. Petitioner's commanding officer rescinded petitioner's promotion to chief petty officer prior to petitioner's court-martial. Tr. 66.

view affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.[5]

1. At the time of his offenses, petitioner had served almost ten years in the Navy. GX 2. On April 20, 1989, petitioner became acquainted with Fireman Recruit Beatty while shooting pool at the bowling alley at the Naval Training Center, San Diego, California. Neither petitioner nor Beatty was in uniform. Tr. 38. Beatty told petitioner that he had an errand to run, and petitioner offered to give Beatty a ride. Petitioner subsequently informed Beatty that he was a chief petty officer. Tr. 39. Petitioner talked with Beatty about prostitution, and he indicated to Beatty that some of his friends were gay. Tr. 40, 42.

After completing the errand, Beatty suggested returning to the bowling alley, but petitioner suggested, instead, that they go to petitioner's off-base apartment for a drink. At the apartment, petitioner got Beatty a glass of whiskey, put on a movie, and told him, "Sometimes I crossover." Tr. 41. Petitioner left the room and returned approximately 15 minutes later in a mini-skirt, a blouse, makeup, and a wig. GX 1; Tr. 42. Beatty immediately left petitioner's apartment, and as he did so, petitioner told him, "I thought you had experienced it. I'll have to show you sometime." Tr. 42.

Several months later, in June 1989, another junior enlisted sailor, Seaman Dennis, whose apartment faced petitioner's apartment, opened his curtains and saw petitioner in a wig and makeup. Tr. 17-18. The

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[5] After the court of military review entered its judgment and before the Court of Military Appeals ruled on this case, the Naval Clemency and Review Board reviewed petitioner's case. The Board remitted his bad-conduct discharge in favor of a general discharge. Pet. App. 2a n.1.

sailor, who knew that petitioner was a senior enlisted member of the armed forces, subsequently complained to the apartment complex manager about having another tenant cross-dress in plain view. Tr. 24. The manager, retired Navy Master Chief Sesley,[6] had also seen petitioner dressed in women's clothing in June 1989, once "just passing by one night" and a second time when petitioner needed the manager's help after locking himself out of his apartment. Tr. 28. Like Seaman Dennis, Sesley knew that petitioner was a member of the armed forces because he, too, had seen petitioner in uniform. Tr. 18, 28. At trial, Seaman Dennis testified that petitioner's cross-dressing was contrary to Navy policy, that he did not approve of petitioner's behavior, and that he would not desire to be stationed with petitioner. Tr. 21, 23-25. The retired master chief stated that the sight of petitioner dressed as a woman "even * * * now burn[s] deep in my heart * * * I'm still depressed about it[,]" and that the esteem in which he held the military had diminished because of petitioner's cross-dressing. Tr. 28-29.

Petitioner was convicted of cross-dressing in April and June 1989, in violation of Article 134 of the UCMJ, 10 U.S.C. 934. Article 134 requires, inter alia, that a servicemember refrain from engaging in conduct that is "to the prejudice of good order and discipline in the armed forces" or is "of a nature to bring discredit upon the armed forces."

2. The court of military review affirmed. Pet. App. 9a-17a. The court found it reasonable to believe that petitioner knew that Navy regulations required him to adhere to "appropriate standards of civilian

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[6] Master chief (E-9) is the highest enlisted grade in the Navy.

attire" when he was off duty. *Id.* at 15a. The court also found no evidence that petitioner engaged in the cross-dressing in connection with "a theatrical event or traditional service ritual," where his conduct would not bring discredit upon the military. *Id.* at 14a n.2.

3. The Court of Military Appeals affirmed. Pet. App. 1a-8a. It explained that cross-dressing by itself does not violate Article 134, and that a court must consider "(1) the time, (2) the place, (3) the circumstances, and (4) the purpose for the cross-dressing" in order to determine whether such conduct will prejudice good order and discipline in or bring discredit upon the military. *Id.* at 6a-7a. Cross-dressing would not violate Article 134, the court explained, if it took place in the privacy of a service-member's home under circumstances where a person had no reasonable belief that he was being observed or would bring discredit upon the armed forces. *Id.* at 7a. The court added that a factfinder must be certain that the prejudicial or discrediting nature of the conduct is focused on military order and discipline, and "is not solely the result of the personal fears, phobias, biases, or prejudices of the witnesses." *Ibid.* After considering the record, the court held that the evidence was sufficient to establish a violation of Article 134. *Id.* at 7a.[7]

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[7] Senior Judge Everett concurred in part and dissented in part. He agreed with the majority that petitioner could be convicted on the April 1989 cross-dressing specification, but he concluded that petitioner could not properly be convicted on the June 1989 cross-dressing specification. Regarding the latter, Senior Judge Everett concluded that the relationship between petitioner's conduct and any military interest was too attenuated to justify finding petitioner guilty. Pet. App. 8a.

ARGUMENT

In *Parker* v. *Levy*, 417 U.S. 733 (1974), this Court held that Article 134 of the UCMJ is not unconstitutionally vague. In this case, petitioner contends that the military courts have interpreted Article 134 so expansively that it does not afford a servicemember adequate notice of what conduct is prohibited. That claim does not warrant review by this Court.

1. To begin with, a decision in petitioner's favor would not require that his conviction be set aside. Petitioner was convicted on two different specifications of violating Article 134, Pet. App. 1a-2a, and petitioner does not challenge his conviction on specification 1, see Pet. 3. His failure to do so is significant because it is well settled under military law that a serviceman is guilty of a charge if he is convicted of any supporting specification. Since petitioner does not challenge his conviction on specification 1, a ruling in his favor on the question he presents in the petition would not require that his conviction be set aside.[5] In

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[5] Under military law, a "charge" is different from a "specification." A charge identifies the specific UCMJ Article that the defendant is alleged to have violated. Rule for Courts-Martial 307(c)(2), *Manual* II-29. By contrast, a specification is "a plain, concise, and definite statement of the essential facts constituting the offense charged." Rule for Courts-Martial 307(c)(3), *Manual* II-29. When a defendant is alleged to have committed more than one infraction of the same Article, there will be only one charge, but there will be several specifications thereunder. Discussion to Rule for Courts-Martial 307(c)(2), *Manual* II-29. Accordingly, a military defendant can be found guilty of a charge as long as he is found guilty of one specification and even if he is acquitted of the remaining specifications. Discussion to Rule for Courts-Martial 918(a)(2), *Manual* II-133 ("Where there are two or more specifications under one charge, conviction of any of

addition, since petitioner was not sentenced to imprisonment and since the Naval Clemency and Parole Review Board, after reviewing petitioner's case, remitted his bad-conduct discharge in favor of a general discharge, Pet. App. 2a n.1; page 3 note 5, *supra*, it is also highly unlikely that reversing his conviction on specification 2 would lead to a further reduction in his sentence. Under these circumstances, the question presented in the petition raises only an abstract issue of no practical importance to this case.

2. On the merits, petitioner claims that the military courts misapplied *Parker* v. *Levy* and so broadened the scope of Article 134 that servicemembers lack reasonable notice regarding what conduct is prejudicial or discrediting to military order and discipline. Pet. 5-9. That claim lacks merit, for several reasons.

First, the Court of Military Appeals correctly found that petitioner was on notice that conduct prejudicial or discrediting to military order and discipline is an offense under Article 134. Pet. App. 5a-6a. The court noted that Article 137 of the UCMJ, 10 U.S.C. 937, requires that the Articles of the Code be explained to servicemembers, first, upon their initial entrance on active duty; again, after completion of six months' active duty; and again, each time a member reenlists. Because petitioner had reenlisted twice since he initially entered on active duty, GX 2, the Code Articles had been explained to him on at least four separate occasions. Those four occasions provided sufficient notice for due process purposes. *Parker*, 417 U.S. at 751-752.

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those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of not guilty as to the other specifications do not affect that charge.").

Second, petitioner had adequate notice that cross-dressing in public view would be treated as conduct prejudicial or discrediting to military order and discipline. *Parker* recognized that authoritative sources of military law as well as less formalized custom and usage give content to Article 134. 417 U.S. at 754 (citing *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65 (1857)); see also *Dynes*, 61 U.S. (20 How.) at 82. Those sources of authority are relevant here, since Navy regulations gave petitioner notice that cross-dressing could be prejudicial to military order and discipline. Standard Organization and Regulations of the U.S. Navy (OPNAVINST 3120.32B) para. 510.10(b), titled CIVILIAN CLOTHING, provides that (emphasis added):

> when civilian clothing is worn, naval personnel will ensure that their dress and personal appearance are appropriate for the occasion *and will not bring discredit on the naval service.*

Accordingly, there is no merit to petitioner's claim that he had nowhere to "turn to find out whether his conduct was actionable." Pet. 9. The military courts properly determined that a chief petty officer with almost ten years of service was on notice that inappropriate civilian dress could be service-discrediting and, as such, punishable under Article 134.

Petitioner concedes that he was properly convicted for cross-dressing in his apartment in front of Fireman Recruit Beatty, because "[t]hat specification included behavior committed in the presence of another." Pet. 3. Petitioner acknowledges that he had reasonable notice of the criminal nature of that behavior because "a reasonable service person would

realize that the UCMJ prohibited such actions." *Ibid.*[9] But if petitioner had adequate notice that the UCMJ prohibited cross-dressing in the presence of Beatty, then he had adequate notice that cross-dressing was prohibited in front of other persons who knew that petitioner belonged to the military. Petitioner cross-dressed in the presence of each of the three witnesses, not just Beatty. The incident involving Beatty is simply a more serious violation of Article 134 than the incidents involving Dennis and Sesley.

Contrary to petitioner's claim, the decision below does not provide military commanders with "an arbitrary and discriminate sword" that can be used to prosecute "any conduct which offends [their] sensibilities." Pet. 7. The Court of Military Appeals explicitly set forth guidelines for determining whether conduct that does not per se give rise to an offense under Article 134 might nonetheless be actionable under that Article. Pet. App. 6a-7a.[10] The court also set forth the requirement that the conduct be "legitimately focused toward good order and discipline" in order to prevent prosecutions based on "personal fears, phobias, biases, or prejudices of the witnesses." *Id.* at 7a. As a result, there is no merit to petitioner's claim that the decision below broadened Article 134

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[9] Petitioner bases his concession as to specification 1 in part on the ground that other provisions in the UCMJ prohibit such conduct. Pet. 3. In fact, there is no such other UCMJ provision. Petitioner recognizes as much by his own statement that he was charged with violating Article 134 "[b]ecause no statutory provision prohibits such conduct." Pet. 3.

[10] Those guidelines answer the concerns expressed by Senior Judge Everett in his separate opinion that almost any eccentric or irregular behavior could be regarded as somehow prejudicial. Pet. App. 8a.

to include conduct with "no reasonably direct or palpable impact on the military." Pet. 8.

The issue presented by this case is not whether "military and civilian defendants have the same right to notice." Pet. 5.[11] The real issue is whether petitioner had notice that cross-dressing in front of others is prejudicial or discrediting to military order and discipline. By virtue of the applicable naval customs, traditions, regulations, and UCMJ provisions, the military appellate courts properly answered that question in the affirmative. The testimony of Seaman Dennis and retired Master Chief Sesley confirm that petitioner's actions discredited the service, Tr. 28-29, and affected its good order and the discipline. Tr. 21, 23-25. Regardless of the fact that petitioner was in or near his off-base apartment when the cross-dressing occurred, it clearly had a direct and palpable effect on others and their view of the service. Petitioner's behavior therefore offended the legitimate interests of the Navy, and could lawfully be punished under Article 134 of the UCMJ.[12]

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[11] It is not the right to notice that differs in civilian and military cases but the circumstances in which the right is invoked. Certain behavior, " 'however eccentric or unusual' is not unlawful in a civilian community but becomes illegal 'solely because, in the military context, its effect is to prejudice good order or to discredit the service.' " Pet. App. 5a (emphasis omitted) (quoting *United States* v. *Davis*, 26 M.J. 445, 448 (C.M.A. 1988)).

[12] Since *Parker*, other challenges to the constitutionality of Article 134 as applied by military courts have consistently been rejected. See, *e.g.*, *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974) (Article 134 is not unconstitutionally vague in prosecution for publishing a statement disloyal to the United States by promoting disaffection among the troops); *Kebrli* v. *Sprinkle*, 524 F.2d 328 (10th Cir. 1975), cert. denied, 426 U.S. 947 (1976) (use of marijuana can be constitutionally prosecuted under Article 134); *Cooper* v. *United*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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States, 20 Cl. Ct. 770 (1990) (longstanding customs of Army gave notice to officer that drinking and fornication with enlisted females in his battalion were punishable under Article 134); *United States* v. *Woods*, 28 M.J. 318 (C.M.A. 1989) (accused who had sexually transmittable disease and who had been counseled not to engage in "unprotected" sexual intercourse was on "fair notice" for prosecution under Article 134); *United States* v. *Wickersham*, 14 M.J. 404 (C.M.A. 1983) (unlawful entry can be prosecuted under Article 134 because authoritative interpretations of military law, existing service custom, and common usages gave notice of the offense). At the same time, military courts have not been reluctant to reverse convictions under Article 134 when notice of the supposedly unlawful conduct is insufficient. See, *e.g.*, *United States* v. *Johanns*, 20 M.J. 155 (C.M.A. 1985) (Air Force officer lacked notice that private, consensual, nondeviate heterosexual acts with enlisted female was violation of Article 134); *United States* v. *Henderson*, 32 M.J. 941 N.-M.C.M.R. 1991) (accused, a Marine Corps recruiter, lacked notice that private, heterosexual, consensual, nondeviate intercourse with three young women was criminal).

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